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No. 90-526 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARIAN W. SHORT,
Petitioner,

vs.

BELLEVILLE SHOE MANUFACTURING COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the statute of limitations for an action under Section 10(b) of the Securities Exchange Act of 1934, should be borrowed from the express limitations periods found in the Federal Securities Acts or from state law?

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ADDITIONAL STATUTORY PROVISIONS INVOLVED

Section 13 of the Securities Act of 1933, 15 U.S.C. §77m (the limitations period applicable to Section 12 of that Act dealing with misrepresentations in the sale of securities):

> No action shall be maintained to enforce any liability created under section 77k or 771(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section

> 771(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 771(1) of this title more than three years after the security was bona fide offered to the public, or under section 771(2) of this title more than three years after the sale.

That part of Section 9(e) of the Securities Exchange Act of 1934, 15 U.S.C. §78i(e) (the limitations period applicable to Section 9(a)-(c) of that Act dealing with the manipulation of the price of securities:

> * * * No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

Section 18(c) of the Securities Exchange Act of 1934, 15 U.S.C. §78r(c) (the limitations period applicable to Section 18(a) of that Act dealing with misleading statements in documents filed under the Act):

> No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

Section 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. §77cc(b) (the limitations period contained in Section 29(b) of that Act dealing with the invalidity of contracts):

> * * * Provided, such action [to declare a contract invalid] is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation.

STATEMENT OF THE CASE

On February 16, 1989, the Petitioner sued the Respondents in the United States District Court for the Southern District of Illinois. Petitioner was then and is now a stockholder of the Respondent Belleville Shoe Manufacturing Company, a family-owned business located in Belleville, Illinois. The other Respondents whom Petitioner sued included her brother and sister and other family members who were, in 1977, members of the Board of Directors of the company.

In her Amended Complaint, Petitioner accused Respondents of Securities Fraud, RICO violations and common law breaches of duty in connection with the May 7, 1977 purchase by the company of 550 shares of its stock from her. In her 1989 action she claimed that she was deceived by her brother and alleged that the shares she requested the company to purchase were worth more than the agreed sales price.

Since 1977, Petitioner has remained a stockholder of the company. Yet in her 1989 action she claimed that she did not know the basis for the valuation of the 550 shares which she sold or about the company's improved earnings after the sale. She even claimed that the true value of the shares which she sold was concealed from her.

However, the uncontroverted facts showed that other shares of the company were redeemed in 1977, including the majority interest of Petitioner's brother. The bases for determining the value to be paid Petitioner and the other shareholders whose stock was redeemed were specifically set forth in the minutes of the company. Since 1977, Petitioner, as a stockholder, has had the continued right to inspect these minutes. Indeed, such an inspection by her attorneys in October of 1988 triggered this suit

and other state court actions which Petitioner has filed against Respondents arising out of the same stock redemption.[1]

On September 29, 1989, United States District Judge William L. Beatty dismissed Petitioner's §10(b) claims alleged in this action. He held that said claims were time barred under ¶137.13D of the Illinois Securities Law.[2] This was the statute that federal courts sitting in Illinois had borrowed for the limitations period in §10(b) actions. *See, Short v. Belleville Shoe Manufacturing Company,* 908 F.2d 1385, 1387 (7th Cir. 1990).

The Illinois blue sky statute set forth a three-year statute of limitations for civil remedies under that act and by a 1986 amendment permitted this period to be tolled, but only for two additional years. Judge Beatty ruled that this statute of repose was applicable to Petitioner's §10(b) claims and that they were therefore barred. He also ruled that Petitioner failed to plead a RICO case and since he no longer had federal jurisdiction over her common law claims, he dismissed those as well.[3]

In her appeal to the Seventh Circuit, Petitioner argued that her §10(b) claims were tolled based upon federal tolling principles notwithstanding the Illinois five-year statute of repose. Respondents argued that Judge Beatty correctly applied the Illinois statute of repose in dismissing Petitioner's §10(b) claims. Respondents also argued that the Seventh Circuit could affirm that dismissal by holding that the three year statutes of repose

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[1] One of her state court actions remains pending in the Circuit Court of St. Clair County, Illinois.

[2] Petitioner, however, asserted no claim in her federal action based upon any violation of the Illinois Securities Law.

[3] District Court Judge Beatty's Order below is reprinted at Appendix A20-28 in Short's Petition For A Writ of Certiorari.

contained in the Securities Exchange Act of 1934 applied to a §10(b) claim and that Petitioner's claims also were barred under those statutes.

As Petitioner points out, the Seventh Circuit affirmed the dismissal of her federal claims, including the §10(b) claim. Judge Easterbrook, writing for the court, held that the most analogous statute of limitations to be applied to Petitioner's §10(b) claim was §13 of the Securities Act of 1933. This section and those relied upon in the 1934 Act provide for a one-year statute of limitations and a two-year tolling period. Thus, the Federal Securities Acts themselves provide a three-year statute of repose to govern federal securities litigation. Accordingly, the Seventh Circuit held that Petitioner's claims were and are time-barred.

REASONS FOR DENYING THE WRIT

Respondents are aware that this Court on October 9, 1990 granted review of the case of *Lampf Pleva Lipkind Prupis & Petigrow v. Gilbertson,* No. 90-333. We understand the question presented which the Court has agreed to review is:

> Shall private civil actions for damages under Section 10(b) and Rule 10b-5 be governed by specific and uniform statutes of limitations borrowed from limitation periods applicable to express causes of action under 1934 Securities Exchange Act rather than being subject to limitations periods borrowed from law of state in which action happens to be filed?

Lampf Pleva Lipkind Prupis & Petigrow v. Gilbertson, cert. granted, 59 U.S.L.W. 3265 (U.S. Oct. 9, 1990) (No. 90-333). In that case the petitioner's contention that an appropriate federal, instead of a state, statute of limitations should be borrowed in §10(b) actions was ignored by both the District Court in Oregon and by the Ninth Circuit. Brief For Petitioner at 6-7, *Lampf,* No. 90-333. In Marian Short's case, the issue was addressed and decided by the Seventh Circuit. Indeed, the decision in this case was the basis for the Petitioner's Supplemental Brief filed in *Lampf.*

Obviously the question presented by Short's Petition will be considered and decided by this Court in *Lampf.* Regardless of whether this Court applies a uniform federal limitation period or continues to permit federal courts to borrow state statutes of limitations under rules announced by this Court, Petitioner's §10(b) claim in this case is time-barred. Therefore, Respondents suggest that there is no reason for granting this petition for a writ of certiorari.

Respondents here had two sound bases to support the dismissal of the §10(b) claims of this Petitioner. One was founded upon the approach taken by Judge Beatty in the Dis-

trict Court. He dismissed those claims because they were barred by the Illinois five-year statute of repose. The other was based upon the rule applied by the Seventh Circuit of borrowing the three year statute of repose contained in the Securities Act of 1933. Both grounds are authorized by decisions of this Court.

This Court's decision in *Lampf* will decide whether the Seventh Circuit was correct in its analysis and application of the federal statute of limitations. The Seventh Circuit applied the law as announced by this Court in *DelCostello v. Teamsters*, 462 U.S. 151, 172 (1983) and *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 150 (1987). These cases instruct a federal court to apply the most analogous federal statute of limitations to a federal statutory claim when the application of state statutes of limitations have created great uncertainty.[4]

If on the other hand this Court in ruling on the question presented in *Lampf* decides that state law should apply in §10(b) cases, then the rule announced in *Wilson v. Garcia*, 471 U.S. 261, 269 (1985), *Board of Regents v. Tomanio*, 446 U.S. 478, 483-86 (1980), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) should be followed. These cases hold that where a federal court borrows a state statute of limita-

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[4] The Court in *DelCostello* announced the rule that a federal court should apply a federal statute of limitations "when the federal policy at stake and the practicality of litigation make [a federal] rule a significantly more appropriate vehicle for interstitial law making." 462 U.S. at 172. The Court in *Agency Holding* ruled the statute of limitations contained in the federal antitrust laws should apply to RICO cases. In so holding this Court elaborated that state statutes of limitations provided nothing but incredible confusion and that "a uniform statute of limitations is required to avoid intolerable 'uncertainty and time-consuming litigation.' " 483 U.S. at 150 (quoting *Wilson v. Garcia*, 471 U.S. 261, 272 (1985)).

tions it is obliged to accept that state's statute of repose.[5] Clearly the Illinois statute of repose *is* consistent with the federal policy to be applied to securities litigation as set forth by the Congress of the United States in its regulations governing securities. *See*, the sections from the Securities Acts cited at 1-2 and footnote 6, *infra*. Thus if a state statute is to be borrowed, the decisions of this Court require a District Judge to accept the state's statute of repose. This is what Judge Beatty in the District Court below did.

These recent cases mandate that federal common law tolling rules can no longer survive and be applied in Illinois.[6] Respondents should not be further embroiled in this expensive litigation, at least not in the federal courts. Under a uniform federal statute of limitations applied in accordance with *Agency Holding*, Petitioner's §10(b) claim is time-barred. Petitioner's claim is also time-barred by the Illinois statute of repose, as determined by Judge Beatty following *Wilson v. Garcia*.

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[5] In *Wilson*, this Court stated that "the length of the limitations period and closely related questions of tolling and application, are to be governed by state law." 471 U.S. at 269. Earlier, in *Johnson*, this Court held:

> In borrowing a state period of limitations for application to a federal cause of action, a federal court is relying on the state's wisdom in setting a limit, and exception thereto, on the prosecution of a closely analogous claim.

421 U.S. at 464. In *Tomanio*, this Court concluded that "in general, state policies of repose cannot be said to be disfavored in federal law." 446 U.S. at 488. *See also Chardon v. Fumero Soto*, 462 U.S. 650 (1983).

[6] The legislative history of both the 1933 and 1934 Acts demonstrates that Congress did not intend equitable tolling to be read into the prescribed limitations periods. Concerns about the disruptive effects that long statutes of limitations would have on the business community prompted Congress to amend the 1933 Act limitations

CONCLUSION

This petition for a writ of certiorari to the Seventh Circuit should be denied.

Respectfully submitted,

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statute, 15 U.S.C. §17m, from a "two year after date of discovery, but in no event more than ten years after the sale" to a "one year, three year" statute similar to those enacted for the express causes of action in the 1934 Act.

During the extensive Senate debate on the 1934 Act, the participants agreed that the outside limitations period was to be absolute:

> If [a plaintiff] has been injured and finds that he has been injured, he ought to bring his action within a reasonable time, and we fix that time at 1 year. *If he has not discovered it,* the person who made the misrepresentation or false statement ought to feel safe at some reasonable time that he will not be disturbed.

78 Cong. Rec. 8198 (remarks of Senator Fletcher) (emphasis added). Due to Congressional concerns that a longer statute might "deter men from serving on boards of directors," the 1934 Act like the amendment to the 1933 Act specifies a three year statute of repose. *Id.* at 8200. As stated by the ABA Task Force Report, the conclusion is "inescapable...that Congress did not intend equitable tolling to apply in actions under the securities laws." ABA Committee on Federal Regulation of Securities, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645, 655 (1986). *See also*, 6 J. Ellenberger & E. Mahar, *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934*, 6565-66, 6718, 6993 (1973).